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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CLYDE TERRY et al., Plaintiffs and Appellants, v. ALAN LEVENS et al., Defendants and Respondents.	A103827 (Solano County Super. Ct. No. FCS021093)
CLYDE TERRY et al., Plaintiffs, Cross-defendants and Appellants, v. ALAN LEVENS et al., Defendants, Cross-complainants and Respondents.	A106673 (Solano County Super. Ct. No. FCS021093)

These consolidated appeals arise out of litigation relating to the lease of commercial property. As will be seen, the issues raised by the parties in their separate appeals all directly or indirectly arise out of a sua sponte judicial order setting the case for trial about five months after the complaint was filed and prior to filing of an answer and completion of any meaningful discovery.

In appeal No. A103827, plaintiffs Clyde and Anne Terry appeal the judgment entered against them after a jury verdict on the grounds that the speedy setting of the case

for trial on the basis of a calendar preference was statutorily unauthorized and denied plaintiffs due process of law and other rights.

In appeal No. A106673, defendants and cross-complainants Alan and Karen Levens contend that the order granting plaintiffs' motion to strike their cross-complaint without leave to amend was legally unjustified, inequitable, and highly prejudicial.

We shall reverse the judgment in plaintiffs' appeal. As we explain, the remand for retrial we order on that appeal renders defendants' appeal moot.

FACTS AND PROCEEDINGS BELOW

Approximately 20 years ago, plaintiffs designated a portion of property they own in the City of Dixon for use as a commercial boarding kennel and obedience training facility for pet dogs and cats, and obtained the necessary land use permit. Defendants, partners in a dog boarding and training business known as "Alan's Canine Training and Kennel," leased the designated premises for a two-year period commencing April 1, 2001 and ending on March 31, 2003, with an option to renew the lease for an additional five years. Section 3 of the lease agreement states: "The premises are to be used for the operation of board and care kennel for pets and for no other purpose, without prior written consent of Lessor." Section 4 states: "Lessee will not use any portion of the premises for purposes other than those specified. No use will be made or permitted to be made upon the premises, nor acts done, which will increase the existing rate of insurance upon the property, or cause cancellation of insurance policies covering the property." The lease also requires lessees to comply with all applicable county land use requirements.

An addendum to the lease agreement modified its terms in several ways. As pertinent, the addendum required defendants to "comply with all laws, ordinances and regulations regarding operation of board and care and training and grooming and breeding kennels." It also permitted defendants to park a "self contained" trailer with a

"24' max. length"[1] on the premises for use as an office and "occasional overnight use." The addendum provided that defendants "will have the option of holding . . . Schutzhund competitions twice a year on the leased property."[2]

On November 27, 2002, plaintiffs filed a complaint in the Solano County Superior Court alleging causes of action for breach of contract and trespass. In addition to termination of the lease, payment of all rent due plus interest, and attorney's fees (as provided by the lease agreement), the complaint also sought a preliminary injunction prohibiting use of the premises for "attack dog or Schutzhund training" or any other unauthorized use.

The gist of the causes of action for breach of contract are (1) that defendants' regular use of the leased premises for attack dog or Schutzhund training is a hazardous and dangerous activity prohibited by the lease, which by its terms limits use of the premises to the operation of a "board and care kennel for pets;" (2) that defendants moved a 33-foot trailer on the premises, in violation of the provision of the addendum permitting a trailer no longer than 24 feet; and (3) that, in violation of the addendum to the lease agreement (which requires the trailer to be "self contained") and local building and land use codes, and without the necessary permit, defendants installed an electrical line to the trailer. The causes of action for trespass alleged that defendants' placement of the trailer on the property and installation of an underground electrical line and chain link fenced kennels were unauthorized uses of plaintiffs' property creating fire and health risks.

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[1] The typed number "24' " was crossed out and replaced by the number "33' " written in script. This change is accompanied by the initials of defendant Karen Levens, and the words: "Snook in after signing."

[2] According to the complaint, the term "Schutzhund" (sometimes in the pleadings and exhibits also spelled "Shutzhund" and "Schuntzhund") "refers to a form of protection training where obedience, scent, tracking, and attack commands are taught in combination." Defendants claim "Schutzhund is a sport," and that dogs trained in this manner are not physically dangerous to others.

With the original complaint, plaintiffs filed a motion for temporary restraining order preventing defendants from engaging in attack dog training on the leased premises and any other activity not essential to the operation of a board and care kennel or not insured, as required by the lease agreement. In their supporting memorandum, plaintiffs asserted that as a result of defendants' hazardous, unauthorized, and uninsured activities on the leased premises plaintiffs were placed at serious risk of irreparable harm, and that defendants lacked the means to compensate them for any monetary damages or costs of defense they might incur in the event of a claim arising from defendants' attack dog training activities. Plaintiffs claimed that defendants' activities also exposed plaintiffs to criminal liability and the loss of reputation and emotional distress such liability would cause. In response, defendants claimed that Schutzhund training is not "attack dog" training, and that their activities on the leased premises are done in a safe and professional manner. Defendants claimed their activities were covered by an insurance policy but the insurer informed them that policy was being cancelled because plaintiffs' son-in-law, Ken Odom, told the insurer that defendants were conducting attack dog training. Because this information was false, defendants argued, plaintiffs "do not have the 'clean hands' that are required to obtain a temporary restraining order."

Plaintiffs' motion for a temporary restraining order was denied by Judge Michael Nail, apparently on the ground that the existing insurance policy would not expire until January 3, 2003. At some point after January 3, plaintiffs filed a motion for preliminary injunction, which was heard by Judge Franklin R. Taft. On February 7, 2003, Judge Taft denied the motion without prejudice, because defendants had obtained a new insurance policy. Judge Taft had been told by defendants that the new policy was also being cancelled because Ken Odom had told the insurance agent and underwriter that they were training "attack dogs," but that the defendants were seeking a third policy. Judge Taft advised plaintiffs they could seek injunctive relief at such time as no insurance policy was in place, but expressed the view that Odom's efforts to have defendants' policy cancelled might constitute "unclean hands" attributable to plaintiffs and a "waiver of the lease."

On February 13, 2003, plaintiffs filed an amended complaint. Eleven days later, on February 24, they filed a motion for temporary restraining order requiring defendants to cease and desist from using and to remove the trailer they placed on the premises, and the appurtenant electrical system they installed, claiming both lacked the necessary permits. After an evidentiary hearing held on March 14, 2003, at which he received the testimony of five witnesses, Judge Taft denied the motion. Finding "that the plaintiffs, probably through Mr. Odom, were making a concerted effort to terminate the lease on whatever basis they can," Judge Taft concluded that plaintiffs were "subject to laches [and the] defense of unclean hands."

At the conclusion of the March 14 hearing, plaintiffs' counsel called the court's attention to the fact that defendants had not filed an answer to the amended complaint filed on February 13, which was due that day. Counsel for defendants explained that they had not filed an answer because counsel for plaintiffs "has indicated that he wishes to amend the complaint again, and we have indicated to him that we would not oppose that motion." Judge Taft, who later said he was "getting tired of every week of having a motion before me," did not accept this explanation or the prospect of any further delay. Defendants' counsel therefore offered to promptly file an answer as well as "our cross-complaint." The court rejected the offer, stating: "What I'm going to do on the complaint, I'm going to deem all material allegations denied and all special defenses raised without the—without filing an answer. [¶] I'm going to set the matter for trial." Telling plaintiffs' counsel, "You're entitled to a preference on the calendar," the court set April 11, 2003 as the trial date. When counsel for defendants reminded Judge Taft that his clients intended to file a cross-complaint, and inquired whether he wanted to sever it from the trial on the complaint, which sought injunctive relief, Judge Taft replied: "As to the cross-complaint, I'm going to sever it because I'm going to have a trial on this, and the trial is going to be April 11."

On April 3, 2003, eight days before the date then set for trial, plaintiffs filed a motion to continue the trial to a date at least 90 days later than that scheduled, together with a motion for leave to amend the first amended complaint. In support of the motion

to reschedule the trial, plaintiffs argued that no statute or rule justified a precedence over all other cases on the civil calendar. Among other things, plaintiffs argued that the case was not an unlawful detainer action, and therefore not entitled to a "precedence over all other civil actions" under Code of Civil Procedure section 1179a,[3] as the trial court seemed to think. Plaintiffs also pointed out that, on March 14, the date the court ordered trial to commence on April 11, defendants had not yet filed either an answer to the complaint or the cross-complaint they indicated they would file, no party had sought a trial date, and the regular case management conference had not been held. Plaintiffs contended that, because defendants had not yet filed their answer and cross-complaint, they had justifiably deferred discovery in order "to effectuate economy in the discovery proceedings." Without such discovery, plaintiffs argued, they were unprepared for trial. Plaintiffs maintained that the court's "sua sponte setting of a trial date that is too close at hand to permit meaningful discovery . . . [prevented them] from effectively exercising their right to produce evidence," and thus violated their right to due process under Article I, sections 7 and 15, of the California Constitution.

On the basis of an order shortening time, the hearing on the motions to reschedule trial and to allow further amendment of the complaint was held the same day the motions were filed. The motion for leave to amend was denied on the ground that the proposed amendments "do not add anything substantive to the first amended complaint sufficient to permit the delay inherent in such amendments and responses thereto." Judge Taft also denied the motion to reschedule the trial, stating as follows: "The case has been pending for over four months, enough time to conduct discovery in such a case, and Plaintiffs have not suggested any specific due process rights which they have been denied by the setting of the current trial date. The court deems this matter to sound in unlawful detainer and injunctive relief, as demonstrated by Plaintiffs', and their counsel's actions during the pendency of the action, and as such has been given preference."

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[3] All subsequent statutory references are to the Code of Civil Procedure.

On April 9, 2003, Judge Taft conducted a conference with counsel at which he informed them that the trial he was then conducting in another case was going to take much longer than anticipated, and he would be unable to commence trial in this case until April 25th. On April 24th, Judge Taft conducted another conference at which he told counsel that trial could not begin the next day, as planned, because of a vacation he had scheduled, and that his courtroom had been assigned for use for a 15-day trial before an out-of-county judge appointed by the Judicial Council due to the recusal of all Solano County judges. After conferring with counsel, the court set July 18, 2003 as the new trial date. The court also ruled on the parties' in limine motions.

Plaintiffs' motions sought to preclude defendants from introducing evidence that plaintiffs sought unfair rent increases, imposed unfair utility charges, confronted defendants' dog training clients, and sought to deprive defendants of their right of first refusal to purchase the property and their option to renew the lease. Plaintiffs maintained that this and related evidence was not related to the claims set forth in the complaint and should be confined to the cross-complaint defendants intended to but had not yet filed. The court denied these motions, but did grant plaintiffs' motion to exclude evidence of news stories related to Schutzhund training.

Defendants' in limine motions to preclude plaintiffs from introducing evidence relating to defendants' unpermitted electrical work on the premises and their lack of insurance were both denied.

For reasons that do not appear in the record, trial did not commence on July 18, the date set, but on July 22. At the close of trial on July 30, 2003, Judge Taft granted defendants' motion for nonsuit as to all causes of action save the third, for breach of contract, and the fourth and fifth, for different trespasses, and also struck the claim for punitive damages. Because the issues we consider it necessary to address do not relate to the conduct of the trial, and there is no claim that the judgment is unsupported by the evidence, we find it unnecessary to summarize the testimony of the 19 witnesses who testified (12 for plaintiffs and seven for defendants), and the other evidence received by the court. Suffice it to say that the chief factual issues presented were the meaning of the

lease agreement, whether the parties agreed to the modifications described in the addendum to the agreement, whether the defendants' conduct violated the terms of the lease and, in the event the jury found one or more violations, the damages, if any, plaintiffs were entitled to receive. More precisely, the questions were whether defendants' placement on the leased premises of the 33-foot trailer was consistent with the lease agreement, whether plaintiffs were aware of and acceded to the unpermitted electrical work performed by defendants on the property, and whether a gravel-based chain link fence defendants installed extended over property not covered by the lease. Deciding these questions in favor of defendants, the jury returned a verdict finding no breach of contract or trespass. Judgment in favor of defendants was entered on July 31, 2003.

Plaintiffs filed a timely notice of appeal from the judgment on August 13, 2003.

On November 6, 2003, more than three months after entry of judgment, defendants filed a "first amended cross-complaint"[4] against plaintiffs, their son-in-law Ken Odom, and Patrick Dwyer, one of plaintiffs' attorneys, alleging causes of action for breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, intentional interference with contractual relationships, intentional interference with prospective economic advantage, abuse of process, intentional infliction of emotional distress, and slander, seeking not only general, special and punitive damages, but also reformation of the lease agreement and an order enjoining plaintiffs and Odom and their agents from entering the leased premises without written permission. Plaintiffs moved to strike the cross-complaint and demurred to the pleading in the event the motion to strike was denied. Both the motion and the demurrer relied on the facts that the cross-complaint was not filed before or at the same time as the answer to the complaint, was not only against plaintiffs, and was not filed with leave of the court, as required by section 428.50, subdivisions (a) and (b). Defendants responded that

[4] There is no indication in the record of any prior cross-complaint having been filed.

section 428.50 did not bar their cross-complaint because, by relieving them of the need to file an answer, Judge Taft also relieved them of the duty to file their cross-complaint "before or at the same time as the answer," as would otherwise be required by subdivision (a) of section 428.50.

Plaintiffs' motion to strike the cross-complaint and demurrer was heard by Judge Harry S. Kinnicut on April 21, 2004. Prior to the hearing, Judge Kinnicut issued a tentative ruling granting the motion to strike the cross-complaint without leave to amend. On May 5, 2004, after considering the arguments advanced by the parties at the hearing, Judge Kinnicut reaffirmed his tentative ruling and issued an order granting plaintiffs' motion to strike the cross-complaint in its entirety, rendering the demurrer moot. His reasoning was set forth in the order as follows: "Code of Civil Procedure section 428.50 requires a cross-complainant [*sic*] against a plaintiff be filed no later than 'during the course of the action,' which ends upon entry of judgment. *City of Hanford v. Superior Cour*t (1989) 208 Cal.App.3d 580. Cross-complainant mentioned the possibility of a cross-complaint [at the March 14, 2003 hearing before Judge Taft], which the judge said would be severed, but cross-complainant still had a duty to file it before judgment was entered. [¶] Finally, this cross-complaint was filed without leave of court, months after the case ended in judgment against the only parties to it, thus leaving this court without jurisdiction over any new claims attempted to be filed in it."

Defendants filed a timely notice of appeal and we thereafter consolidated their appeal with that previously commenced by plaintiffs.

DISCUSSION

Appeal No. A103827

The chief claims advanced on appeal by plaintiffs are that (1) the setting of trial in this case on the basis of a calendar preference not sought by any party was statutorily unauthorized, and (2) the effect of the preference was to deny plaintiffs meaningful discovery and, therefore, their constitutional right to a fair hearing. We believe these claims have merit and, accordingly, shall reverse the judgment and remand the matter for retrial.

I.

The propriety of the grant of a statutory calendar preference presents a question of law; we therefore decide the issue independently. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

At the time Judge Taft placed this case on the trial calendar, no party had asked that the case be set for trial, the regularly scheduled case management conference had not yet taken place, and, as plaintiffs explained, the date set by the court would effectively cut off discovery, which neither party had yet commenced. Judge Taft rejected these objections. Denying plaintiffs' motion to continue the April 11 date, he found that four months was enough time to conduct discovery in the case, and stated that because "[t]he court deems this matter to sound in unlawful detainer and injunctive relief, . . . [it] has been given preference."

The preference statutes Judge Taft apparently relied upon are section 1179a, which relates to unlawful detainer actions, and section 527, subdivision (e), which relates to hearings on orders to show cause why a preliminary injunction or temporary restraining order should not be granted. Neither statute supports the court's ruling.

Section 1179a provides: "In all proceedings brought to recover the possession of real property pursuant to the provisions of this chapter [i.e., summary proceedings for unlawful detainer,] all courts . . . shall give such actions preference over all other civil actions therein, except actions to which special precedence is given by law, in the matter of the setting of the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined."

The complaint in this case alleged beach of contract and trespass. The trial that was had on those claims clearly was not the type of summary proceeding to obtain possession of land to which section 1179a applies. Indisputably, plaintiffs had a tenable action for breach of contract. "A lease is a contract. (*Medico-Dental etc. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 418-419.) Its breach will give rise to a claim for contract damages. (4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 575, p. 752 ['The measure of damages for breach of a lease is that established by [Civil Code

section] 3300 for breach of contract'].) When a lessee breaches a lease, '[t]he lessor may recover, in addition to past and future rentals . . . "Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom." ([Civ. Code, §] 1951.2, subd. (a)(4).) This is the ordinary rule of damages for breach of contract under [Civil Code section] 3300. . . . [¶] Examples of such damages are the lessor's reasonable expenses in retaking possession of the property, in making repairs that the lessee was obligated to make, in preparing the property for reletting, and in reletting; also damages for the lessee's breach of covenants, such as a covenant to maintain or repair the premises, or a covenant to restore them on termination of the lease. (Law Rev. Com. Comment to [Civ. Code, §] 1951.2.) [Citation.]' (4 Witkin, Summary of Cal. Law, *supra*, Real Property, § 679, p. 867 . . . .)" (*Old Republic Ins. Co. v. Superior Court* (1998) 66 Cal.App.4th 128, 147-148, italics omitted, overruled on other grounds in *Vandenburg v. Superior Court* (1999) 21 Cal.4th 815, 841, fn. 13.)

Plaintiffs also alleged a facially tenable cause of action for trespass, which is an unlawful interference with possession of property. (*Girard v. Ball* (1981) 125 Cal.App.3d 772, 788.) " '[A] trespass may occur if the party entering [land] pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another. "A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with." [Citations.] Moreover, section 160 of the Restatement Second of Torts provides in pertinent part: 'A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land [¶] '(a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated, . . .' " (*Mangini v. Aerojet-General Corp*. (1991) 230 Cal.App.3d 1125, 1141-1142, fn. omitted.)

Ordinarily the form of the action appropriate to a case such as this, other than unlawful detainer, will be either contract or tort, but not both. As has been stated, in some situations "the same wrongful act may constitute both a breach of contract (or ground for its rescission) and the invasion of an interest protected by the law of torts. It would seem to be the privilege of the injured party to bring either type of action, or to file one suit pleading both causes of action in separate counts, whenever it would be to his advantage to do so. Of course, he would be required to elect, at some stage, between inconsistent remedies, and would not be entitled to a double recovery. [Citation.] But, subject to these limitations, there generally appears to be no objection on principle to the plaintiff suing either in contract or in tort [citation], at his election." (3 Witkin, Cal. Procedure (4th ed. 1996) Actions § 139, pp. 203-204.)[5]

Just as a plaintiff claiming the violation of a lease may elect to sue either in contract or in tort, so too does he or she have the privilege to elect the remedy of unlawful detainer, as an alternative to either a contract or tort action. Whether a contract or tort claim "sounds" in unlawful detainer is an interesting question (see *Fragomeno v. Insurance Co. of the West* (1989) 207 Cal.App.3d 822, 830-831, overruled on other grounds in *Vandenburg v. Superior Court*, *supra*, 21 Cal.4th at p. 841, fn. 13), but it is not one we think it necessary to decide. For our purposes, the significant difference is procedural. Unlike the trial of contract and tort actions, unlawful detainer actions are *summary proceedings*. The time periods for pleading and service are shorter, the period for setting the matter for trial is likewise shorter, and several expeditious enforcement procedures are provided, in addition to priority on the trial calendar. (See 4 Witkin, Summary of Cal. Law (9th ed. 2004) Real Property §§ 706, 707, 711, 712.) For example, the tenant in an unlawful detainer action has only five days after the summons is served

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[5] At the close of trial in the present case, the court informed plaintiffs that "you've got the same factual situation giving rise to a tort claim [and] a contract claim[,] which I think requires an election." The court permitted both types of claims to be presented to the jury, and defendants agreed, because use of a general verdict would permit the court to insure plaintiffs would not receive double damages in the event they prevailed on both claims.

to answer or demur (§§ 1167, 1167.3), and unless the tenant surrenders possession, he or she is generally not permitted to file a cross-complaint. (See *Medford v. Superior Court* (1983) 140 Cal.App.3d 236, 239.) "It is well-established an action for unlawful detainer can co-exist with other causes of action in the same complaint *so long as the entire case is treated as an ordinary civil action, not as a summary proceeding*." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 608, italics added.)

Plaintiffs never sought to convert their action into an unlawful detainer proceeding. Had they done so defendants, who made it clear they intended to file a cross-complaint, would doubtless have objected vigorously. Nor did the court order the case to be tried as an unlawful detainer action, and it clearly was not tried as such. What the court did was to treat the case as an unlawful detainer action *for no purpose other than giving it an unsought preference over other civil actions*. Trial judges have considerable discretion to move cases expeditiously to trial, but they do not have roving authority to treat an ordinary civil action as an unlawful detainer action for the limited purpose of giving it precedence over other civil actions. If permitted, the unspecified exercise of such a broad judicial power might easily wreak havoc with the administration of civil justice.[6]

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[6] Section 36, subdivisions (a) through (e), provide judicial discretion to grant motions for preference in a civil case in the interests of justice *only* where the movant "reaches the age of 70," or "suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months," or upon "a showing of cause which satisfies the court that the interests of justice will be served by granting such preference." None of the necessary showings, or even a motion, was made in this case, and the court never relied upon section 36 or indicated how "the interests of justice will be served by granting the preference." (§ 36, subd. (d).)

It is worth pointing out, however, that cases suggest that granting a request for a trial preference under section 36 might violate the due process rights of the other party if it did not provide him or her adequate time to prepare for trial. (*Peters v. Superior Court* (1989) 212 Cal.App.3d 218, 227; see also *Roe v. Superior Court* (1990) 224 Cal.App.3d 642, 643-644, fn. 2*; Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867-868.)

Defendants do not defend the trial court's granting of a preference on the theory that it "sounds in unlawful detainer." They argue instead, as they did in the trial court, that the case was entitled to a preference under section 527, subdivision (e). That statute is, however, manifestly inapplicable.

Subdivision (e) of section 527 states that, in response to an order to show cause why a preliminary injunction or temporary restraining order should not be granted, the opposing party may present affidavits, and if they are served on the applicant at least two days prior to the hearing, "the applicant shall not be entitled to any continuance on account thereof." The statute continues: "On the day the order is made returnable, the hearing shall take precedence over all other matters on the calendar of the day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence over all other cases, except older matters of the same character, and matters to which special precedence may be given by law."

The word "cause" in the last sentence of subdivision (e) does not refer to the trial on the merits of legal claims. As Witkin points out, section 527, subdivision (e), "deals only with the time for hearing specified in an ex parte order to show cause, which is 15 days (or 22 days for good cause shown) from its issuance [citation.]." (6 Witkin, Cal. Procedure, *supra*, Provisional Remedies, § 372, p. 303.) Such a hearing took place on March 14, 2003, when Judge Taft conducted an evidentiary hearing on plaintiffs' final effort to obtain a temporary restraining order, at which he received the testimony of five witnesses. Judge Taft refused to grant a restraining order, but he left plaintiffs' claims for breach of contract and trespass for determination by the jury at trial. Clearly, that trial was not entitled to a calendar preference under subdivision (e) of section 527.

II.

One of the effects of Judge Taft's sudden order placing the case on the trial calendar was to cut off discovery. Unlike unlawful detainer proceedings, "in which discovery shall be completed on or before the *fifth* day before the date set for trial" (§ 2024, subd. (c), italics added), parties to an ordinary civil proceeding are entitled as a

matter of right to complete discovery proceedings on or before the *30th* day before the date set for trial. (§ 2024, subd. (a), italics added.) As defendants acknowledge, the order setting trial in 30 days immediately cut off any further discovery. For several reasons, plaintiffs had conducted no discovery prior to March 14, 2003. For one thing, they were then preoccupied with their several efforts to obtain injunctive relief, with the need to contest defendants' motion to strike the complaint and demurrer, and with amending the complaint, as required by the court's granting of the demurrer in part. Their failure to have initiated discovery earlier was also due to the facts that defendants had not yet filed an answer and had expressed the intention to file a cross-complaint. As plaintiffs told Judge Taft, they felt it would "effectuate economy in the discovery proceedings" to await receipt of the answer and cross-complaint.

Section 2017, subdivision (a) provides: "Unless otherwise limited by order of court in accordance with this article [i.e., sections 2016 through 2036.5] any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Though the order setting the case for trial appears to have been made solely for the purpose of expediting trial, its most significant effect was to preclude virtually any discovery. However, the limitation on discovery was not achieved in a manner authorized by any of the discovery provisions of the Code of Civil Procedure. Defendants never complained that plaintiffs' failure to initiate discovery earlier was dilatory or otherwise objectionable, nor does the record show it to have been. The court's denial of plaintiffs' motion to reschedule the trial on the ground that four months was "enough time to conduct discovery" begs the real question. The issue is not whether "over four months was enough time to conduct discovery" in a case such as this, as the trial court concluded, but whether plaintiffs' failure to have completed it during that period warranted the extreme sanction of preventing any further discovery. The court never made that inquiry, and the record provides no reason to think that plaintiffs' conduct warranted such a sanction. The peremptory setting of trial in a manner that

effectively deprived plaintiffs of pretrial discovery was error. We turn to the question whether it requires reversal.

III.

"A judgment may not be reversed on appeal, . . . unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) When the error is of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)" (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 574.)

Plaintiffs argue that the denial of discovery—particularly the right to depose defendants and their expert witnesses—made it impossible for them to effectively present convincing evidence. Such a denial of the right to produce evidence, they say, is a violation of due process requiring reversal. Relying primarily on *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, plaintiffs maintain that a per se reversible error standard applies. *Judith P.* was a dependency case in which it was held that the failure to provide the mother a status report recommending termination of reunification services at least 10 days before the status review hearing, as required by statute, was per se reversible error absent either a continued hearing or an express waiver. Applying the analysis adopted by the United States Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279, the *Judith P*. court concluded that the stage at which constitutional error occurs determines whether it is "trial" or "structural" error, and therefore the applicable standard of error. " 'Trial error' is error that occurs *during the presentation of the case*. (*Arizona v. Fulminante, supra,* 499 U.S. at p. 307.) An error that occurs during the trial process itself does not require automatic reversal because a court may quantitatively assess such error in the context of other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. (*Id*. at pp. 307-308.) [¶] In contrast 'structural' errors involve ' "basic protections, [without which] a criminal trial cannot reliably serve its function as a *vehicle* for determination of guilt or innocence, and no

criminal punishment may be regarded as *fundamentally fair*." ' (*Arizona v. Fulminante, supra*, 499 U.S. at p. 310, italics added.) Examples of such structural errors that result in automatic reversal (the per se reversible error standard) include total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, denial of the right to a public trial, and an erroneous reasonable doubt instruction to the jury. (*Id*. at pp. 309-310.)" (*Judith P. v. Superior Court, supra*, 102 Cal.App.4th at pp. 555-556.) The per se reversal is justified in these and other situations because, "[u]nlike erroneous admission of evidence or improper instructions, which can be reviewed in light of the evidence or instructions as a whole, the impact of having less than the statutorily mandated minimum time within which to . . . contact witnesses, . . . obtain documents, . . . prepare for examination and cross-examination, and . . . hone one's arguments, is impossible for either a trial court or an appellate court to assess." (*Id*. at p. 557.)

It is true that the dependency process must pass constitutional muster because it can operate to deprive individuals of their constitutional right to parent or to be raised by their families of origin, and that no analogous constitutional right is ordinarily at play in litigation such as this over the meaning of a lease agreement. Nevertheless, California courts have expressed concern that the setting of a trial date that deprives a party of the state law right to meaningful discovery may in and of itself violate the plaintiff's right to due process of law. (See, e.g., *Lafayette Morehouse, Inc. v. Chronicle Publishing Co., supra,* 37 Cal.App.4th at pp. 867-868; see also, *Peters v. Superior Court, supra,* 212 Cal.App.3d at p. 227; *Roe v. Superior Court, supra,* 224 Cal.App.3d at pp. 643-644, fn. 2.) Furthermore, due to the difficulty of assessing the prejudicial effect of structural error, our courts have applied the reversible per se rule without finding it necessary to decide whether the error adversely effects a constitutional right other than that of due process. (See, e.g., *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677; *Guardianship of Waite* (1939) 14 Cal.2d 727, 729; *Caldwell v. Caldwell* (1962) 204 Cal.App.2d 819, 821.)

For example, in *Kelly v. New West Federal Savings, supra*, 49 Cal.App.4th 659, the trial court erroneously granted in limine motions precluding the plaintiffs and their witnesses, including an expert witness, from producing certain evidence. The effect of granting the motions, the Court of Appeal explained, "was to prevent plaintiffs from offering evidence to establish their case, *meaning the error is reversible per se*. It would be a further miscarriage of justice were we to conclude otherwise. Because of the court's preclusion, we have nothing more than evidence referenced in argument on the motions and plaintiffs' brief opening statement of the nature and extent of the evidence plaintiffs' counsel would have been able to present during the trial. The record supports an inference that plaintiffs were injured as a result of a misleveling problem with one of the elevators and that respondents did have knowledge that such problem existed." (*Id.* at p. 677, italics added.)

In the present case, in support of their motion to continue the trial date, plaintiffs emphasized that the order setting trial in 30 days would require them "to present their case with their hands tied behind their backs."[7] Without the depositions of defendants and many of their witnesses, plaintiffs claimed, they would be unable to adequately present their case and prepare for the examination and cross-examination of their and defendants' most important witnesses. Though trial in this case did not commence in 30 days, as Judge Taft intended when he made his ruling of March 14, 2003, but instead on July 22, the parties agree that the effect of the March 14 order was to cut off essentially all discovery between March 14 and July 22, the day trial actually commenced. So far as the record discloses, the only deposition taken of any witness in this case was that of Hans Freitag, a German citizen who was one of three expert witnesses allowed to testify for defendants despite the fact that they were not on defendants' witness list. Judge Taft denied plaintiffs' requests to depose two of the

[7] Defendants do not genuinely dispute plaintiffs' claim of prejudice. Their position appears to be that the calendar preference was justified under section 527, subdivision (e), whether or not plaintiffs were prejudiced.

newly identified witnesses, but did order Freitag to submit to deposition (apparently because he lived in Germany and could not easily have been deposed prior to March 14, 2003), and Freitag was deposed by plaintiffs the day before trial commenced.

The testimony of the many expert witnesses presented in this case was obviously of great significance. It is difficult to imagine that plaintiffs inability to depose all but one of these witnesses was not prejudicial, particularly in light of the trial court's denial of most of their in limine motions to limit the evidence.[8] Plaintiffs were not alone in fearing surprise from the testimony of opposing witnesses. In his opening statement, defendants' counsel told the jury: "I don't think anybody can be certain of what the evidence is going to show. This case developed very quickly. Um, a lot of the things that happen in cases normally, such as depositions, where you really know what a witness is going to say, did not happen in this case."

Because it effectively barred them from engaging in the basic discovery essential to effective trial preparation, the unsought and wholly unexpected order setting the case for trial in 30 days deprived plaintiffs of the right to a fair trial. For that reason, and because the effect of the court's erroneous denial of discovery cannot be assessed reliably, the judgment is reversible per se. We deem it unnecessary to discuss plaintiffs' subsidiary claims, as they are either unlikely to arise on retrial,[9] or moot,[10] or manifestly unsupported by the record.[11]

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[8] Most of the evidence plaintiffs unsuccessfully sought to exclude appears more relevant to the claims set forth in defendants' postjudgment cross-complaint than to those alleged in the complaint.

[9] Plaintiffs claim the granting of nonsuit on four causes of action is reversible error. However, even assuming defendants move at retrial for nonsuit of the same causes of action, the availability of pretrial discovery makes it unlikely the evidence relating to those causes of action will be the same.

[10] Plaintiffs' claim that denial of their pretrial motion for a restraining order constituted judicial nullification of public law. However, the claims made and the relief sought by the denied motion were identical to claims and relief sought in the complaint. "It has been held that where preliminary injunction is denied and later after a hearing on the merits, a final judgment denying the injunction is made, the order denying the

Appeal No. A106673

Defendants' appeal is from Judge Kinnicut's order of April 28, 2003, granting plaintiffs' motion to strike their postjudgment cross-complaint.

As previously noted, in reliance on *City of Hanford v. Superior Court, supra,* 208 Cal.App.3d 580, Judge Kinnicut struck the cross-complaint on the ground that "section 428.50 requires a cross-complainant [*sic*] against a plaintiff be filed no later than 'during the course of the action,' which ends upon entry of judgment." In Judge Kinnicut's view, Judge Taft's order of March 14, 2003 relieving defendants of the need to file an answer and severing the cross-complaint did not relieve defendants of the duty to file their cross-complaint before judgment was entered.

Defendants claim Judge Kinnicut erred. Their position, as succinctly stated in their opening brief, is that Judge Taft "clearly anticipated that this case would proceed in exactly the manner in which it has proceeded: the Terrys' case against the Levens was to be tried first; the cross-complaint by the Levens against the Terrys was severed and was to be litigated later." Defendants reason that statutory requirement that a cross-complaint be filed "before or at the same time as the answer to the complaint" became inapplicable, as did *City of Hanford v. Superior Court*, when Judge Taft relieved them of the need to file an answer.

We think it highly questionable whether section 428.50 contemplates or permits the filing of a postjudgment cross-complaint, and *City of Hanford v. Superior Court,*

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preliminary injunction is merged in the final order, and the appeal from the order denying the injunction pendente lite becomes moot. [Citations.]" (*Pahl v. Ribero* (1961) 193 Cal.App.2d 154, 160-161.)

11 Plaintiffs' third subsidiary claim is that the trial court's denial of their pretrial motions to exclude certain types of evidence was reversible error. However, even if we were to assume the rulings were erroneous, plaintiffs have not explained their prejudicial effect. The final subsidiary claim, that the rulings of the trial court were the product of judicial bias, is unsupported by the record. To be sure, the rulings in question may be seen as reflecting an excessive judicial predilection to speed up the trial of this case, but the record does not show this attitude was inspired by a bias against plaintiffs.

supra, certainly does not.[12] On the other hand, defendants' statement that Judge Taft wanted this case to proceed as it did seems to be correct. Defendants did not ask the court to accord this case a preference on the trial calendar or, after it did so, to relieve them of the need to answer the complaint. It was only after the trial court peremptorily set a quick trial date that defendants suggested the possibility of severing the cross-complaint, apparently believing that might be the only way to preserve their ability to file a cross-complaint at all. It is true that defendants could have filed an answer prior to trial. However, by "deem[ing] all material allegations [of the complaint] denied and all special defenses raised without . . . filing an answer," Judge Taft seemingly relieved

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[12] In *City of Hanford v. Superior Court, supra,* 208 Cal.App.3d 580, a city petitioned for a writ of prohibition or mandamus directing the trial court to vacate its order allowing a power company leave to file a cross-complaint and other relief. The city and the power company had together successfully defended earlier consolidated actions against them by environmental groups seeking to halt construction of a cogeneration project planned by the power company and approved by the city. After entry of judgment, the environmental groups appealed, and the city, upon reconsideration of its earlier decision, enacted a moratorium against issuance of the permits necessary for the project to proceed. The trial court granted the power plant leave to file a cross-complaint challenging the moratorium, finding that it was a continuation of the earlier action. The Court of Appeal issued the writ, holding that the earlier action had concluded when judgment was entered, and therefore the purported cross-complaint could not be maintained. As the court stated, "permitting leave to file a cross-complaint after judgment has been entered on the complaint does not further the purpose for cross-complaints. . . . The reason for allowing cross-complaints is to have a complete determination of a controversy among the parties in one action, thus avoiding circuity of action and duplication of time and effort. [Citations.] While it makes sense to join multiple causes of action at the outset in order to permit efficient resolution of a controversy, it makes no sense to add new causes of action to a controversy which has been resolved and the result of which cannot be altered by any issue raised in the new pleading. [¶] Second, a judgment is the final determination in the trial court of the rights of the parties in an action or proceeding. (§ 577.) Thus, entry of judgment on the original complaints was a final resolution in the trial court of the issues therein between [the parties]." (*City of Hanford*, at pp. 587-588.)

The only significant difference between *City of Hanford* and this case is that in this case, as we next point out, the trial court helped create the problem.

defendants of the need to actually file an answer. In short, defendants may have been as prejudiced by the trial court's erroneous acceleration of trial as plaintiffs.

By remanding this case for a new trial we reestablish the situation that existed prior to Judge Taft's erroneous acceleration of trial, effectively rendering moot the issue decided by Judge Kinnicut. Plaintiffs will have a fresh opportunity to try their claims. Defendants will need to file an answer and may file a cross-complaint at or before the time their answer is due. It would be wholly unjust to provide plaintiffs immunity from a cross-complaint, as that is among the burdens a plaintiff must ordinarily bear at trial.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.[13]

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Ruvolo, J.

[13] Defendants' request that we take judicial notice of a tentative ruling of the Solano County Superior Court in a related case (*Levens v. Terry*, Super. Ct. No. FCS024141) is denied.